

6 3
PROPERTY

RE-ASSERTED,

1490. 6. 10
In ANSWER to the

ARGUMENTS and EXCEPTIONS

In a late PAPER, Intituled,

PROPERTY

VINDICATED.

*Non firmatur tractu temporis, quod de Jure ab initio
non subsistit.*

Sext. Decret. Lib v. de Reg. Jur. 18.

D U B L I N :

Printed in the Year M,DC,XL.



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To His GRACE the
DUKE of DEVONSHIRE,

Lord Lieutenant of IRELAND,

May it please Your GRACE,

THIS little Piece begs first admittance, then protection: If Your GRACE's good Nature can prevail with You, for this condescension, I shall ask no more: What I want is, to set the authority of Your NAME, against the Objections of my Adversary; that it may put to silence, what I trust I have confuted.

I do not mean, by his example, to call forth Power against Reason, to awe and over-rule it; but Your Authority, greater than Your Power, to Ballance the Attempts that have been made against it: That both Sides may be heard, and their mutual Pretensions fairly Vindicated: That Reason may preside in our Disputes, and Law direct and controul our Resolutions: What Rational Man would refuse to submit to such restraints! Every Friend of the Community, will join to forward such a Proposal.

Tho' I am a Friend to the Establishment, I have as little of the Bigot in my Sentiments, as any Man living; where any Thing wants Correction, I should rejoice to see the mild methods of Reason and Law employed; but where the mistakes are only in our humours, I cannot consent to an alteration, which
would

DEDICATION.

would appear unreasonable, if these were defecated, and the Fermentation over.

The Equity of Your GRACE's Administration, and the Amiable Moderation of Your Counsels and Actions, equally tender of the Prerogative of our Sovereign, and the Rights of His People, blending them without confusion, and guarding them without distinction; might have taught us a better method to compose our Animosities, than we seem to be in a Temper to pursue; but since it is our Misfortune not to improve by so bright a Pattern, it will be a new addition to Your Glory, to give efficacy to it, by some more operating Expedient.

I should exceed all bounds of Modesty, and Duty too, by presuming to offer any Thing in that way, from my own Judgment, to a Person of Your GRACE's Wisdom and Penetration. *Ipse Tibi es Senatus*: Your Virtue and Prudence will direct You to the best Means, and the Dignity of Your Station, with the Rank You bear in Your Prince's Favour, will doubtless make them prevailing.

Who I am, as it is not necessary, so it is beneath You to enquire: I conceal my name, only to avoid the suspicion of intending the Advantage of any Thing beside my Cause: For as I have no awe from the Humour or Resentment of others, it would be a Satisfaction to me, to fix my name to any Thing, that gives me the Honour of acknowledging, with what faithful Respect,

I am,

Your Grace's

most humble,

and Devoted Servant.

PROPERTY

RE-ASSERTED, &c.

ALTHOUGH from some late Experiments, it would seem to be a dangerous Thing for any Man to stand up in behalf of the Clergy; yet I don't see, why a Person who has nothing to fear from the Humours of others, need be ashamed to appear for them, in Cases where they have Law and Reason on their side: I shall never be convinced but that their Rights should be held as sacred and inviolable as other Men's: Whilst they pretend to none but such as are natural and legal, and are willing to submit their Demands to the Determination of the Law in the ordinary Forms and Methods of Justice, their Rights and Privileges stand upon the same footing with our own, and the Violation of them is equally iniquitous: Therefore whatever Liberty is challenged by those who oppose them, may with equal Reason be vindicated by such as take in Hand to defend them.

I own it is with Reluctance, that I enter into the Dispute, and would be much better pleased the Occasion of it were taken away by some sober Methods to reconcile the contending Parties: But because the present Humours of Men inflamed by unaccountable Prejudices, yeild little likelihood, that any thing of this kind shall

be quickly effected; I have therefore taken upon me to consider, what has been advanced by a late Author against the Clergy's Right to the Tythe of Agistment; with a view to convince such as are unprejudiced, that their Cause is neither become desperate nor indefensible, by any thing he has said against it.

As the Author did not think himself obliged to maintain and justify all the Arguments and Reasons in the Pamphlet, upon which the Author of *Prop. Inviol.* has made his Remarks: So neither shall I think my self bound to defend all the Reasons and Arguments, upon which he hath made his Remarks; it will answer my Design to shew that his Reasoning, as to the main Point in Question is precarious and inconclusive.

The Author artfully insinuates in the Beginning, that the Clergy's Demand to this Tythe is a late thing: Which is throwing a Prejudice in the Reader's Way, as if it were a new and unheard of Demand; and so indeed he elsewhere calls it: And yet when he comes, p. 14. to consider the Statute of the 33 of *Hen. 8.* which had been alledged to prove, that the Tythe of Agistment was once accustomed in *Ireland*: Instead of answering that Allegation, he takes no farther Notice of the Argument at all; than by briefly acknowledging, "That Agistment is paid in some Parts of this Kingdom at this Day;" and then pretending not to understand what the Author meant, flies off to discourse of another Matter, quite foreign to what he had been considering in the Beginning of the Paragraph, and ought to have answered.

It will therefore be proper before we go farther, to observe, that nothing of this Kind can affect the general Question; which strictly is this, *viz.* what Right they have to make this Demand; and not when it was first made: And if they have a Right

to the Tythe in Question, it is in my Judgment no way material, when this Demand was first made, or how long the Clergy had neglected to make it.

However, as the Act of Parliament referred to, proves undeniably, that Tythe of Agistment was once accustomed in this Kingdom; So for the Satisfaction of such as may never have heard so much of this Matter before; I shall briefly inform the Reader, that the first Instance, wherein it was litigated upon which a judicial Resolution was given, was as I can find in the Case of *Neal and Stradford*, brought into *England* on a Writ of Error on a Judgment in the *King's Bench* here, *Mich. 7 Geo. 1.* in *B. R.* subsequent to this, there have been several others, and in each of them the Clergy have had their desired Success: From whence it is very reasonable to infer, that their Right to this Demand was a good one, because in the forementioned Case, it was litigated with great Expence, and very nicely canvassed both in *England* and here; and it would be very strange to me, if the Judges in all the Courts, were so prejudiced in Favour of the Clergy, as to give Judgment for them, in a Case unprecedented, and contrary both to the Statute and Common Law of this Kingdom, as the Author pretends this Demand is: And I am humbly of Opinion, that after so remarkable a Resolution in the Case given, it had been more reasonable to expect the Laity should have acquiesced to their Demand; than that the Clergy should now acquiesce under some *late Resolutions*, as this Author, *p. 34.* would advise.

P. 4. He insists, that the true State of the Matter in Question is this, *viz.* "Whether in a County where
 " no Tythes for dry and barren Cattle have been paid
 " in Time of Memory, and where the Clergy in that
 " County have had a sufficient maintenance time out
 " of mind, without receiving or demanding Agist-

“ ment, such a Custom or Usage against the Pay-
 “ ment of that Tythe be good or not.

But with Submission, I am far from thinking this to be the true State of the Question: For this Reason; that it takes in, and leads to the Determination of Matters, which ought to be considered distinctly and by themselves, previous to the Consideration of what we are upon: As, *viz.* what is a sufficient Maintenance, and whether that Maintenance has been enjoyed time out of mind, without the Clergy's ever demanding Agistment; for I hope he does not expect, that Matters so important as he hath made them, should be taken for granted upon his arbitrary Suggestion, without Proof; when he must nevertheless own, that if his Suggestion fails, his whole Argument is overturned and falls to the Ground.

The true State of the Question therefore, as I apprehend, is briefly this: “ Whether, if the Clergy
 “ having, as the Laws now stand, a Right to the
 “ Tythe in debate; a Usage or Custom against
 “ the Payment of that Tythe be a good one:” The Reader will easily observe, that there is a great Difference between his State of the Case and mine; for in one, the Law is supposed to be against the Custom, and in the other, the Custom is pleaded and given for Law.

But granting the Author's to be the true one, he has nevertheless given some ground for Complaint, either by endeavouring to confound it, or by receding so quickly from it: For when he comes to argue upon the Case and produce his Authorities, *p.* 14. he tells you, “ That all the Authorities that seem to
 “ differ from this, are to be understood with this
 “ Distinction, *viz.* where the Clergy have a Main-
 “ tenance, and where they have none. For I do
 “ agree, says he, that a Prescription *in non decimando*,
 “ where there is no Maintenance provided for the
 “ Clergy

"Clergy is void." But to have dealt candidly, he ought not to have omitted the Word *Sufficient*, because I am of Opinion, that the weight of this single Word will turn the Scale against him at last: For if upon full and free Enquiry it should hereafter appear, that the Clergy in those Parts, where this prescription is pleaded, have not otherwise a sufficient Maintenance, he will then be obliged to confess that, even upon his own state of the Case, they have a right to the Tythe in dispute. And indeed the Gentleman seems to be aware of this, for tho' in one place he tells you, that by a sufficient Maintenance, he means a Comfortable and Honourable Subsistence; yet in another, it is enough that they have hitherto lived without this Tythe, no matter how, nor after what manner; but of this more hereafter. I shall only add with regard to what I have been now upon, that if after such pains to state the Case to his own liking, he should fail in point of Evidence, and not be able to prove what he has undertaken, the Credit of his Cause must sink in the Judgment of all Men of Sense and Reason.

As a Preliminary to what is to follow, I must observe, that in most of the Law Books, wherein this matter is handled, there is a surprizing variety in the several Resolutions and Reports; nay in some apparent palpable contradictions, the very contrary of what had been settled and agreed for Law at one time, being seemingly resolved at another; and that too in cases seemingly of the same Nature.

I look upon it to be an impossible point, for us at this day to assign, or so much as to guess with any certainty, at the reasons upon which these so seemingly different Resolutions and Judgments were Grounded.

They might possibly have arisen from a difference

ence in certain Circumstances, attending those Cases at the Time; or from some bias and influence the Court might have been under, when Judges with regard to their Office and Authority, were not upon so good a footing, as they are at this Day: But whatever the Cause was, the thing is certain and clear, that in most other points, as well as in the one now before us, there are seemingly Cases against Cases, Resolutions against Resolutions, and the Opinions of Judges at one Time, against the Opinions of Judges at another: Sometimes too a Case was Resolved *per totam Curiam*, sometimes only by a Majority, and sometimes the Majority was led by the Weight of one Man's Opinion, whose Credit and Authority had been used to lead the Way, and drew others after him, What I have now observed, is so plain, that there is no One who has just looked into the Law-Books, tho' in Ever so slight and cursory a manner, but what must see and be sensible of it.

Hence it is, that Men are so liable to give mistaken Judgments and Opinions in such Matters, and been led to apprehend that the Case is so or so in certain Matters, when it is quite otherwise, upon finding what they imagine, or would have to be the true state of that Matter resolved by the Court at a particular Time, or in a Special Case, or delivered as Law, by a particular Authority.

Hence too it is, that at all times a particular attention is to be given to the Special Matter in question, in the several Resolutions and Reports; and likewise, to some nice Distinctions laid down in these Cases, upon which, for the most part, the Merits of the whole Cause turned and depended.

Hence too it is evident, and may therefore be no way surprizing, that a Man laying down any One Proposition for Law, and vouching it by One or more

more Authorities, may be easily mistaken, and the Law in the issue, upon a full and free enquiry, appear to be quite the contrary of what he supposes it to be.

And lastly, hence too it follows, that in all such Matters, the Authority of one positive express Act of Parliament, subsequent to any of the Cases and Resolutions quoted, ought to preponderate, and turn the Scale against any Number of such like antecedent Authorities, because the determinate sense of that Act is, and must be the ground of all subsequent Resolutions.

This then being premised, we may join issue with the Author, and affirm, with regard to the Matter now in hand, that whatever intricacy or obscurity may seem to attend it, from Judgments given in particular Cases, the Law in general is clear and express against him; and I believe it would puzzle him, or any other, to instance in any other Case, in which there was less Reason from the seeming contrariety of Judgments and Resolutions, for doubt and dispute; tho' on account of what hath been already observed, there may appear to be ground for some in every possible one that can be brought, with regard to every other Article of Property as well as this; and if it were not so, it is impossible that so many Debates should daily arise about sundry Articles of Property, and such diversity happen between the Opinions of Lawyers, eminent both for their Integrity, and Knowledge in the Law.

Here then I would ask the Author, and all concerned in this Debate, Whether, in a Point of this Nature, that which hath been admitted for Law an hundred times over, and after being so frequently Adjudged, is come at last to pass for a Maxim in Law, and as such to be generally received, should not be admitted at this Day, notwithstanding

withstanding the authority of two or three particular Instances, wherein it would seem to be contradicted? Especially, if in these Instances it may be shewn, that the Matter in hand was such as did not come within the general Rule and ordinary known Maxim of the Law.

If this be not reasonable, in my opinion it will be impossible for any Man, to make Sense or Reason of the greatest part of what hath been delivered, by those who have treated of such Matters; for take them altogether, and it will be hard to collect any One general Proposition, more generally Received and Assented to than this, *viz.* That a Prescription *de non Decimando*, in things Tythable of common Right, is not good.

Mr. *Watson*, whose Authority is as much relied upon as any Man's, in all Cases of this Nature, lays it down as a general Maxim, from which we are never to depart, and that the contrary was in no Case ever admitted: But because he hath been sometimes suspected of partiality to his own Order, and that a Gentleman of the Law hath not very long since published a Treatise, called *The Law of Tythe*, with no friendly Eye to the Rights of the Clergy, and with an acknowledged intent in many things, to take off from the Credit of Mr. *Watson's* Authority; I shall here transcribe one or two Passages from him, which on account of his Character, and the Design of his Treatise, may possibly have the greater weight with some Readers.

“ Tythes of Agistments, and Herbage of Barren Cattle, are due of common Right; and where Tythes are due of common Right, a County, or a Hundred, cannot Prescribe in a *non Decimando*: *Contra*, if Tythes are not due of common Right, for there not only a County, but a Hundred, may so Prescribe”. And for this he gives a Cloud of Authorities: “ *Hickes* “ and

“ and *Woodson's Case*. 2 *Salkeld* 655. 4 *Mod.*
 “ 336. *Cumberbach's Reports* 403. *Skinner* 560,
 “ 561.” The two first of which the Author al-
 lows, p. 23. make against him, tho' he hath en-
 deavoured, by a strange Gloss, to evade the Force
 of them.

Again, “ The Reasons, I apprehend, why
 “ Prescriptions of *Non decimando* for Wood, have
 “ been so often allowed, is, that Wood is not
 “ tytheable of Common Right, but by Custom
 “ only ; and therefore, as by Custom Wood is
 “ tytheable, so by the like Custom it may be ex-
 “ empt from the Payment of Tythes ; but SUCH
 “ PRESCRIPTIONS in *Non decimando* have NE-
 “ VER BEEN ALLOWED to discharge Corn,
 “ Hay, or any such like thing, which are of
 “ Common Right tytheable. *Cb.* 2. p. 65.

I need not Trouble the Reader with reasoning
 upon these Authorities, for with regard to a Ville
 or a Hundred, the Author admits it, p. 24. to be
 as we say ; he only insists that it is otherwise with
 regard to a whole County ; and, methinks, the
 Clergy would be no great Loosers if they were to
 grant him all he contends for, because, if I under-
 stand him, which indeed is often very difficult, he
 pleads an Exemption for no more than one particu-
 lar County in this Kingdom : But, nevertheless,
 until he brings better Proof, I think they may be
 excused from allowing him even so much.

His principal Authority, and which he triumphs
 upon most, p. 12. is that of Dr. and Student ;
 but he might have found, and have informed his
 Reader, that That very Authority was rejected,
 and over-ruled, in a Case where the Question was
 only about the Tythe of Wood, which is not
 tytheable *De jure*.

The Case was this : Upon a Suit for the Tythe
 of Under-wood in the *Wilds of Kent*, a Prohibi-
 tion was prayed, upon a Suggestion that they had a

Prescription to be discharged of the Tythe of Under-wood, growing in the *Wilds* there : But *Coke*, Ch. Just. answered, That what was said by *Lindwood*, and Dr. and Student, was with this Proviso, That there be besides a sufficient Maintenance for the Parson, otherwise it is not good.

But *Dodderige* said, that by *Lindwood*, and Dr. and Student, a whole County may be discharged of the Payment of Tythes in general, but this at the first ought to have a lawful Commencement, by way of Composition or the like, which could not be shewn in this Case ; and with him the whole Court agreed, and so a Prohibition was denied. 2 *Bulf.* 285. 1 *Roll. R.* 22. *Cases of Russel and Buckhurst, and Porter and Tike.*

If then it were so in things not tytheable *De jure*, *a fortiori*, it will hold, and ought to be concluded in things that are so : And from hence it is plain, that the very Authority upon which he declares himself willing to put the Merits of the whole Cause, is full and clear against him.

But the Gentleman is so zealous, that rather than quit his hold, he will pay the Clergy a Compliment they little expected at his hand, and allow, p. 10. " That Wood is a Natural Tythe, and " payable of Common Right, as well as Grass ; " tho' he gives no other Reason to support this extraordinary Opinion, " But that Tythe of Grass " is not payable till cut down, more than Wood : " Which Reason would have indifferently served, had the Question been of the Tythes of Corn.

However he must know, that it has been resolved that Wood is not tytheable *De jure*, (see *Cumberbach.* 404.) and a great deal besides is to be said in reason, to shew that they are upon a quite different footing : As,

1. Grass is a Natural Increase arising out of the Ground, without the Labour or Industry of Man ; and I presume the Author will not deny that a Parson

Parson may have a Right to the Tythe of the Natural Increase in many Cases, when he has no Right to a Share of another's Industry : If not, the *Quakers* themselves shall argue it with him. See Answer to the Parson's Plea against the *Quakers* Tythe-Bill.

2. If Wood were a Natural Tythe, it would puzzle him to give a Reason, why it should be confined to *Sylva cædua*, and that Timber-Trees above 20 Years Growth should be exempted.

3. It appears that Tythe of Wood was first introduced to be paid to the Clergy, in the 17th Year of *Ed. 3.* by a Canon made by *John Stratford*, Archbishop of *Canterbury*. See *Palmer* 38. and 2 *Roll. R.* 122. From all which it appears, that the Author is as unfortunate in his Reasons, as his Authorities.

The pains that he has taken in stating the Bishop of *Winchester's* Case, to shew from thence, that a Layman may prescribe in *Non decimando*, he might therefore have very well saved ; for no one will deny him, that in special Cases he may : And all that can be argued from hence is, that in such Cases, where a Layman is capable of Tythes, there too he may prescribe in *Non decimando* ; but then this is as to Tythes in general, and no way affects the Point in hand : Nor did the Lessee of the Bishop of *Winchester* prescribe in the Case quoted as a Layman, but as a mixt Person, on account of his holding under a Bishop, and such Lands as by Law were discharged of Tythes ; so that the collecting of such Authorities is of no other Use, than to amuse the Publick, and such as have neither Leisure nor Capacity to examine the Weight of them.

For even granting that they were all pertinent to the Case in dispute, as they are not, yet they would be of no force to annul a received Rule, and established Maxim of the Law, strengthened and supported by an Act of Parliament, which is the greatest Authority that the Subjects of this Kingdom have any Notion of ; and which, if it is not at all times to be

submitted to, the Disputes in Law will be endless, and the Decisions for ever uncertain.

What therefore the Author whom he opposes had laid down, *viz.* that “ Supposing such a Custom in “ *Non decimando* were by the Common Law good, “ as it is not, yet that it is a bad Custom by Act of “ Parliament,” must be admitted as fair and good Reasoning ; and all that we have to do, is only to consider the Sense of the Act, and to determine what the true Meaning and Intent of it is ; for the Authority is incontestable, when the Sense is once fixed.

To this I have heard it argued, tho’ not by the Author, That an Act of Parliament, by being disused, grows obsolete, and looses its Force ; but to such I reply, with the D— of *Buckingham*, “ That “ Acts of Parliament are not like Women, the “ worse for being old ; and that they are ever in “ Force, till repealed.”

The Act cited is 33 *Hen. 8. ch. 12. sess. 1.* and this the Author would have us believe ; “ If it “ proves any thing in the present Case, proves against “ his Adversary.” Why ? Because, says he, *p. 13, 14.* “ This Act was made to quiet the Clergy in the “ Possession of things they had formerly enjoyed, “ and not to give them a Right to things they never enjoyed.” Be it so : And then, by his own Confession, if the Tythe in question was one of those things which the Clergy had formerly enjoyed, their Right to enjoy it for the future is by this Act secured : Now to this purpose the Words of the Statute are so plain, that it is surprizing how the true Sense of it could escape him. The Words of it are, “ Have used to substract and withdraw the lawful “ and accustomed Tythe of Corn, Hay, PASTURAGES, and other, &c.”

Doth not the Statute here call the Tythe in question a lawful and ACCUSTOMED Tythe ? And from hence I would know will the Author make it appear, that it was not, when the Act calls it so ?

Why

Why from hence, " because the Statute recites, that
 " many persons inhabiting in sundry Places and Coun-
 " ties in *Ireland*, had contemptuously offended by
 " withholding and substracting them: ". From which
 Words he would have it inferred, that this had been
 by ancient Custom, though that very part of it which
 he hath quoted, *p.* 12. expressly says, " That these
 " contemptuous Offences had prevailed but for a few
 " Years past."

The Sense of the Statute is plain enough to deter-
 mine the Merits of the whole Question in dispute, and
 I defy him ever to get over it, but by an Act to re-
 peal it.

But to do Justice to this Author, he seems to
 suspect, that his reasoning upon this Point will not
 hold, and my Conjecture is founded upon his taking
 so much Pains to amuse the Publick with strained Ar-
 guments, upon Points that had not been in question;
 as will presently be seen when we come to consider
 what he hath said of Compositions, previous to
 which we must take notice of somewhat he hath ad-
 vanced, *p.* 16. and tho' with an Air of great Positive-
 ness and Certainty, has nothing at all in it.

The Sum of it in few Words is this; that what is
 Sauce for a Goose is so for a Gander: Now says he,
 " This being allowed, I think every person ought
 " to allow, that if Time out of Memory of Man, or
 " Prescription will give one Man a Title to any
 " Thing, it ought to give a Title also to another, and
 " if Time out of Memory of Man or Prescription
 " will bar one Man of any Title he may have to
 " any Thing, I think it ought equally to bar ano-
 " ther; and he concludes this to be so plain, that no-
 " thing but an absolute Power can contradict it.

But if the Law doth contradict it, and that in cer-
 tain Cases there are Exceptions to this general reason-
 ing, whereby the generality are tied down, yet others
 are free, who can help it? He ought to quarrel with
 the Law, but not with the Clergy; for why should
 they not make use of any Privilege the Law gives
 them?

them? But the Fallacy and low Sophistry of his reasoning shews it self by an easy Distinction, between Things wherein the Right or Claim is founded only upon Custom and Usage, and such as Men may have a natural and just Claim to without any such Usage or Custom: In the 1st we grant that where a Right hath accrued only by Custom, it may be lost by disuse, and if the Author will confine his Argument to such Things, I see no body he has to contend with; but if this will not satisfy him, however hard he may think the Case, or whatever tragical Complaints he may make of the miserable State of the Subjects of this Kingdom with regard to their Property, (as he does *p. 25.*) in other Things both Law and Reason contradict him, will have it otherwise; and I say who can help it? That the Law says so, I have the Authority of *Coke. 1 Buls. 240.* “ That after a Custom or a
 “ Prescription (even on a Modus) to be discharged of
 “ Tythes is created by Continuance of Time, yet it
 “ may be afterwards lost by disuse, or non-payment
 “ of the Consideration, or otherwise, and in such case
 “ the Parson may have his Tythe in Kind, for Cu-
 “ stom or Prescription may be lost as well as gotten
 “ by Time.” From whence it is plain, that whatever force is in the Author’s reasoning here, turns against himself, and yet without the Clergy’s being any way to blame or in the Fault.

Now all that the Author hath laid down consequent to this, concerning Compositions, is nothing at all to the Purpose: Altho’ such Things have been formerly brought into question, no Man will dispute with him at this Day, “ That a Layman may not be discharged of Tythes by Composition Real.” All that the Clergy or their Advocates for them insist upon, is only that when a Composition is pleaded, some Proof of it should be brought; I do not say that there must be always some written Evidence of it produced, for tho’ at the Commencement of a Composition, it must have been either by Deed under Hand and Seal, or by Fine in the King’s Courts, yet it is not always necessary

cessary to produce the Deed; but some other Proof, as a Modus, must be pleaded, or it must be shewn that in those Places where the Custom prevails, some other Consideration hath been paid, or held by the Clergy in lieu, to which they had otherwise no Right, as Lands, &c.

Nor doth this put the Laity under such Hazards and Hardships as the Author *p.* 19, complains, for I admit that a Modus is proof of the Composition, and that in some Cases it may be sufficient for the Parishioners to alledge the Consideration, if it have been in Lands, nay farther that it is not necessary for them to shew how or by what Title the Parsons had the Land; for that if they plead they had the Land in any other manner than in Recompence and Satisfaction for the Tythes, they themselves are obliged to shew that.

If then he can shew that in the several Parishes in the County presenting, the Clergy have several Lands in Composition for this Tythe, let him do it, and the Parson's Claim there is bar'd: If not, where is the Hazard and Hardship of this Case more than a thousand others daily litigated in our Courts.

And yet for all this I must tell the Author, thro' him to inform the Publick, that in all Cases where a Modus is pleaded, yet it will not do, if it be either uncertain, or unreasonable.

The Modus must be certain as the Thing destroyed or lost by it, so a Modus to pay a Penny or thereabouts, or on or about such a Day, is not good because of the uncertainty of it, but if the Modus be certain for one Penny, tho' so very small it is good. *2 Roll abr.* 265. and *New Cases in Law and Equity*, 375, 376.

So it is too if the Modus be unreasonable, as for instance, that all Persons having Lands within such a Town, but not inhabiting within the same, shall pay 4*d.* an Acre only in Satisfaction of Tythes, because it gives greater Privileges to Foreigners than to the Inhabitants,

habitants, who by reason of their resiancy are obliged to greater Charges, &c. See 1 *Lev.* 116.

So likewise where it was alledged, that the Person prescribing did some Service, or provided some Necessaries to the Church whereby the Parson was not benefited.

Now tho' the Author could not be ignorant of all this, yet it passes for nothing with him, but still he is so confident that the Custom is good against the Clergy, that *p.* 22. he tells them with a Sneer, " That
" if they think the Custom of paying no Tythes for
" dry and barren Cattle, is now become unreasonable
" or grievous in any County, it would be proper for
" them to apply for Relief to Parliament, where no
" doubt they will meet with that Success which the
" Misfortune of their Case deserves."

To all which I answer without a Sneer, that whenever there is a Necessity for their having such recourse, I doubt not they will meet with such Success; for I am confident, the Decisions of that august and honourable Body, will be always according to Law, or Equity, where it may be necessary to mitigate the Severity of the Law by the Alteration of a Custom; but I apprehend they are not under this Necessity at present; for I can see no reason why they should not be at liberty to make use of their legal Privileges as well as other Men, to have their Claims and Demands tried and determined in the ordinary Forms and Methods of Justice.

If there are no Laws now in force to adjust their Claims by, or if the Customs, and the Nature of the Claims founded thereon, are so doubtful as not to admit of a clean Dicision by Law, in the common Course, let a new Law be made either to confirm or take them away: But if both are clear in their favour as I am of opinion they are, if for no other reason, yet clearly for this alone, that they have the Resolutions of the Courts of Justice, in so many late Instances, on their Side, where the Judges ought not to be supposed to carry any partial Bias to the Order,
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or to be under any undue Influence : Then I am for indulging them as well as others in this unquestionable Privilege, either of enjoying their Rights quietly, or of trying their Demands in the common Methods of the Law.

I shall never dispute the Power of the Parliament to alter, transfer, or abolish Men's Rights, when the Claimants have either justly forfeited, or where the Demand, tho' legal, is by any Accident, or Alteration in the State and Circumstances of the People, become unreasonable, by being injurious or oppressive to the general Rights and Privileges of the Community : Neither will I deny, that I think such Rights are Trusts, tho' not differing from Property in general ; but then I think the general Reasons, in the present Case, are against such a Proceeding ; and there is nothing in the Clergy's Case, whereby it may be shewn, that they have any way forfeited their legal Rights, or that those Rights are upon such a footing, or have been for some Ages, as to give any great reason for Complaint ; which I beg leave to say, ought to be shewn, and that very clearly, before it can be reasonable to bar them, in any one Instance, of their legal Demands.

To return where I was, I must observe, that the Author has, *p.* 27. what appears to me, a very odd Suggestion : *viz*, " That the same Principle of Reason which supports small *Modus*, will support " Prescriptions in *Non decimando*." Singular indeed ! And it is a little unfortunate for this Gentleman, that he cannot in this case contend with the Clergy, without contending also with the Laws ; for I have shewn him, that by Law the Right to the Composition is lost, and the Custom not good where no *Modus* can be pleaded, or nothing is held by the Clergy in recompence to which by Law they are not intitled ; and the Clergy may here complain in their turns, that it is a little hard, that tho'
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they are content to part with their Property, even at the Gentleman's own Price, be it ever so small, if he can prove his Bargain, yet cannot content him, unless he may have it for nothing, without even being obliged to their Bounty in pleading a free Gift.

I am for allowing every Man the Benefit of his Bargain, even tho' it should appear that one of the Parties had been overseen or outwitted in the making of it, so tender am I of violating, in any Case, the known Laws of the Land ; but the least that can be expected is, that Men should prove their Bargains, for here I can tell him, as he doth me, *that REASON is reciprocal*, and that where there are not mutual Conditions, there could be no Bargain : So that, for ought the Author hath advanced to prove the contrary, there appears to be very great Reason to distinguish, “ Between paying no Tythes at all, “ and paying so small a recompence for them, that “ it would not be worth the Pains and Trouble of “ gathering it from the several Parishioners :” He must at least confess, that there is this Difference, that the one is a good Proof of a Composition real, and precludes them in Law from demanding more, even by their own Concession ; which they have never yet granted in the other : And the Practice of the Clergy leaves him no room to suppose, that if such a Composition had ever been, they would have let their Right to the *Modus* be lost for want of demanding it. A Penny is but a low Recompence, in many places, for the Tythe of a Garden ; and yet they have universally continued the *Modus* by an annual Demand of that small Acknowledgment. The same may be said of the Custom of paying a Penny in discharge of the Tythe of Wool, and so in several other things ; And I humbly conceive, that if such a Composition had even been, some faint Traces of it might yet be found ; if any such can be shewn, let us produce them, and I will answer

swer for the Clergy, they shall accept of the Gentleman's Offer, *p.* 27. and either keep to their Bargain, or give up the Consideration, which he pleases: So little ground is there for a Charge of Artifice and Craft in this Case.

That the Clergy enjoy a Consideration in recompence of the Tythe in question, the Author is fond of supposing; but what that is, unless it be their Lands, he hath not told us: But being aware that they might reply, that they held their Lands by Grant from the Crown, and not by Composition, he endeavours, *p.* 20. to guard against it, by saying, " That all the Lands which the Clergy now
 " enjoy, were formerly Appropriations to Religious
 " Houses, who probably came to them by Compo-
 " sition for Tythes: ' Suppose it were as he says, yet does he not know, or hath he forgot, that such Composition was voided by the Resumption of those Lands, and their being vested again in the Crown: But he is not certain even of that, and therefore only says probably, and he is in the right not to be positive, for there is not so much as a Probability in the Case, their Lands generally coming to them by Donation and free Gift, often by Legacy or Bequest. Besides, if his Argument proves any thing, it proves too much, *viz.* that the Laity, on account of the Church's enjoying such Lands, might be discharged of paying all or any Tythes: However, when a Plea of this Nature is brought in Bar to any particular Tythe, the Composition must be shewn, and some special Proof of it alledged; and tho' it should be found, that their holding of Lands in any particular Parish, were sufficient to discharge the Payment of a particular Tythe in that Parish, yet it will scarce be pretended that other parts may be discharged also, where no such Lands are enjoyed by the Church.

In other places he intimates, as if he thought the Clergy had several Considerations in Satisfaction of this Tythe of Herbage; and that it is reasonable to expect they should relinquish their Right to this, on account of some other Tythes which they enjoy, but to which they have no Right but by Custom, and instances particularly, *p. 25.* in the Tythe of all Fish taken upon the Coast, which Custom he says hath obtained so universally, that some Books have said, " That Tythes of Fish were due by the " Common Law of *Ireland*, and that the Judges " *ex officio* ought to take notice of it."

What he here says is indeed most true, but if he intended any thing in it as an Argument in favour of the general Question, he may be told that paying of Tythe of one thing cannot discharge the Right of Payment for the Tythe of another; and then, that he either has not heard, or has forgot, that the Tythe of Fish taken upon the Coast, is in many places begun now to be disputed and withheld, especially in the *North*, where the Clergy are driven to the Hazards and Hardships of engaging with very powerful Adversaries, in order to recover a Right which the Laity do now openly, by their Advocate, acknowledge is incontestable, and what the Judges *ex officio* ought to take notice of: The Clergy are however bound, I think, to return him Thanks for this candid Acknowledgment, and I presume they will, if hereafter they reap any Benefit from it.

There seems to be nothing farther necessary to be considered on the present Subject, unless it be, whether, in those places where the Exemption from this particular Tythe is pleaded for, the Clergy have otherwise a sufficient Maintenance; which, if the Author be not mistaken in his Authorities, is a very important Point, and ought to be thoroughly discussed. I am not sufficiently apprized of the just
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state of the Parishes in those Places most concerned in this dispute; but if the Clergy are minded to put a stop to all Popular Declamation upon this Topick, their way will be to draw up such a one, and lay it before the Publick; for at present I am of Opinion, that upon a true state of the Case, after due and regular inquiry, it would be found that they had not: It is no satisfactory account to some to say, that generally throughout the Kingdom, the Church is well Endowed, and the Clergy well Supported, which I think true, and yet nothing to the purpose; or that because in those Parts they have lived for some time without this Tythe, they may do so still. The only proper Enquiry, if I mistake not, is whether such Matters are in those Parts upon a proper Footing, and in the due regular state they ought to be in; if so, then there is some Reason and weight in what he says, otherwise there is none.

Now the frequent Pluralities in those Parts, would seem to give demonstration against him: For he will not surely say, that these things ought to be, and continue for ever, in the manner they have been long time held; for tho' it should be allowed that 40 *l.* a Year, were a Maintenance sufficient for one Clergyman, yet this signifies nothing in the case, unless it may be also shewn, that this is made up in a proper and just manner: If it be in a way that it ought not to be in, as by the union of two or three or more Parishes, the force of his Reasoning is lost; for by the original Design in the Institution of such things, each Parish should have a distinct Incumbent, many of which do not make up 30 *l.* a Year, some not 20 *l.* some less; and where this is the case, there it cannot be said there is a sufficient Maintenance.

And what is the Reason why those Parishes yield so small a Revenue? In many Places, it is, because the Land is depopulated, and not cultivated, but depastured;

depaſtured; by which means it yields a much ſmaller Tythe than it would, if under Tillage: And again, becauſe this Tythe, the Tythe in diſpute, is withheld. What therefore we ſo often upbraid and object to the Clergy as a fault, and is indeed one of the greateſt Blots in our Eccleſiaſtical Conſtitution, and yet is nevertheless irremediable, as matters now ſtand in many parts of the Kingdom. What the Clergy however are willing to remedy, and have in view, by inſiſting upon this Demand, that very thing the Author aſſigns as a Reason why this Demand ſhould not be paid, and would have it to conclude againſt them.

Put the Caſe it were otherwiſe, that every ſingle Pariſh in the County preſcribing, yielded a Revenue of 40 l. a Year; is 40 l. a Year a Comfortable or Honourable Subſiſtence? A young Man, who has no other Charge than his own Perſon, may diſpenſe with it; but it will be found a very ſcanty allowance for a Family, and but a ſlender ſecurity againſt that growing Contempt, that ſeems to be a little too modiſh and prevailing: And what is become of the Man, when Age and Infirmary overtake him, and the Duties of his Function muſt be diſcharged by a Substitute? I cannot bring my ſelf to under-value the Labours of the Miniſtry, and to rate them ſo low as this Gentleman does; and therefore till ſome reaſonable Equivalent is provided, ſome better Proviſion than they enjoy in many Parts, where this Tythe is now diſputed: I cannot think it any derogation or Inconſiſtency with their general Character, of being *Mefſengers of Peace*, as he in deriſion calls them, that they aſſert their legal Rights, only by legal Methods.

Let us conſider, the ſlow progreſs the Reformation has yet made in many parts of this Kingdom; the Ignorance, and uncivilized Manners of the Natives; and we ſhall find abundant arguments to induce

duce all to wish and endeavour, rather by some sober methods of Law and Reason to augment the Number of Incumbents, than drive them to a necessity, as they have hitherto frequently been, of accumulating three or four, or six Parishes, to make up a Decent and Comfortable Subsistence for One.

I shall not insist longer upon this Topick at present, upon which, I nevertheless think, a great deal might be said very usefully : I shall only beg of the Gentleman, in cool Blood to consider this whole Matter, and he may probably find Reason to alter his Notions and Sentiments in many Things.

I think I have said enough on the general Argument, to support my own side of the Question, and am concerned for no more. I only wish I had fallen into better Hands.

To Conclude ; Whatever the Author, or others in his Opinion may say, or suspect, I can assure him, I have no design to keep up the Spirit of Party, which is already grown, in my Judgment, to too great a height on both Sides ; and therefore am ready, (and doubt not the Clergy will do the same) to submit my Opinion, and the Reasons of it too, to the Voice and Authority of the Publick, whenever any determination shall be made of it in a legal and Parliamentary way ; but till this is done, I claim the Privilege of a Freeborn Subject, to declare my Opinion, as the Clergy also do, looking upon themselves in the same Capacity and Situation, to assert their Rights.

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